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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 752

DAI MING SHIH, WONG LUM, AND FU KUEI HUS, PETITIONERS

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 17–19; R. 17–19) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 30, 1961 (R. 20). The petition for a writ of certiorari was filed on February 27, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the provision of Section 243(a) of the Immigration and Nationality Act, 8 U.S.C. 1253(a), authorizing an alien to be deported to the country of which he is a "subject, national or citizen, if such country is willing to accept him into its territory", prevents a native of China from being deported to Formosa as the country of which he is a subject, national, or citizen.

STATUTE INVOLVED

Section 243 of the Immigration and Nationality Act of June 27, 1952, 66 Stat. 163, 212, 8 U.S.C. 1253, provides in pertinent part:

> (a) The deportation of an alien in the United States provided for in this Act, or any other Act or treaty, shall be directed by the Attorney General to a country promptly designated by the alien if that country is willing to accept him into its territory, unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States. No alien shall be permitted to make more than one such designation, nor shall any alien designate, as the place to which he wishes to be deported, any foreign territory contiguous to the United States or any island adjacent thereto or adjacent to the United States unless such alien is a native, citizen, subject, or national of, or had a residence in such designated foreign contiguous territory or adjacent island. If the government of the country designated by the alien fails finally to advise the

Attorney General within three months following original inquiry whether that government will or will not accept such alien into its territory, such designation may thereafter be disregarded. Thereupon deportation of such alien shall be directed to any country of which such alien is a subject, national, or citizen if such country is willing to accept him into its territory. If the government of such country fails finally to advise the Attorney General or the alien within three months following the date of original inquiry, or within such other period as the Attorney General shall deem reasonable under the circumstances in a particular case, whether that government will or will not accept such alien into its territory, then such deportation shall be directed by the Attorney General within his discretion and without necessarily giving any priority or preference because of their order as herein set forth either—

(1) to the country from which such alien last entered the United States;

(2) to the country in which is located the foreign port at which such alien embarked for the United States or for foreign contiguous territory;

(3) to the country in which he was born;

(4) to the country in which the place of his birth is situated at the time he is ordered deported;

(5) to any country in which he resided prior to entering the country from which he entered the United States;

(6) to the country which had sovereignty over the birthplace of the alien at the time of his birth; or

(7) if deportation to any of the foregoing places or countries is impracticable, inadvisable, or impossible, then to any country which is willing to accept such alien into its territory.

* * * * *

STATEMENT

Petitioners, Chinese crewmen, who had overstayed their leave, were ordered deported "pursuant to law" (R. 7, 9–10, 13–14). Later, the petitioners were notified that they would be deported to Formosa (R. 2, 4).

Petitioners then filed suit in the United States District Court for the District of Columbia for a declaratory judgment and injunctive relief, alleging that they were each "subjects, nationals, or citizens of China", and not of Formosa, and that the Attorney General could not deport them to "Formosa as the country of which they are subjects, nationals or citizens" (R. 2–3). The district court dismissed the complaint and granted the respondent's motion for summary judgment (R. 15–16). The court of appeals affirmed (Pet. App. 17–19).

ARGUMENT

The applicable statute is the second alternative for deportation under Section 243(a) of the Immigration and Nationality Act[1] (*supra*, p. 3), providing:

[1] The first alternative, under which the alien may be permitted to choose the country to which he is to be deported, did not apply. Petitioners Dai Ming Shih and Fu Kuei Hsu did not indicate any country of their preference (R. 9, 10). Petitioner Lum Wong asked to be deported to Hong Kong (R. 13), but there is nothing in the record to show that Hong Kong, within the 3-month period provided in Section 243(a), expressed willingness to accept him.

> Thereupon deportation of such alien shall be directed to any country of which such alien is a subject, national, or citizen if such country is willing to accept him into its territory. * * *

Under this provision, petitioners, as "subjects, nationals, or citizens" of China (the Republic of China), are being deported to the "country" (the Republic of China) of which they are "subjects, nationals, or citizens". That "country" (the Republic of China) is "willing to accept" them "into its territory", *i.e.*, Formosa, which for the purposes of this statute is to be considered territory of the Republic of China. Therefore the deportation of the petitioners to Formosa is wholly lawful.

1. Petitioners alleged in their complaint (R. 2) that they are "subjects, nationals, or citizens" of China. The government of China which the United States recognizes is the Republic of China. That country, the Republic of China, being a state in the international sense and a foreign government which the United States recognizes as the legal government of China,[2] is a "country" under Section 243(a) of the Act. *Ying* v. *Kennedy*, 292 F. 2d 740, 743 (C.A.D.C.), certiorari denied, 368 U.S. 914. Cf. *Burnet* v. *Chicago Portrait Company*, 285 U.S. 1, 5, 7. It is "willing to accept" the petitioners "into its territory" (Formosa) as the lawful destination of their deportation.[3]

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[2] 31 Dept. State Bull. 889 (1954); *Rogers* v. *Cheng Fu Sheng*, 280 F. 2d 663, 664, n. 2 (C.A.D.C.), certiorari denied, 364 U.S. 891.

[3] The record affirmatively shows the consent of the Republic of China to the issuance of passports for the deportation of petitioners Dai Ming Shih and Hsu Fu Kuei to Taiwan

2. Formosa is properly considered as territory of the Republic of China for the purposes of deportation under the part of Section 243(a) here involved. It is true that neither Article 2 of the Japanese Peace Treaty of April 28, 1952, under which Japan renounced all "right, title and claim" to Formosa, nor any other agreement has purported to transfer the sovereignty of Formosa to China. 39 Dept. State Bull. 1005, 1006 (1958). Formosa is however a territory occupied and administered by the government of the Republic of China which has "undisputed control of the island". *Rogers* v. *Cheng Fu Sheng*, 280 F. 2d 663, 664–665 (C.A.D.C.), certiorari denied, 364 U.S. 891. The Mutual Defense Treaty between the United States and the Republic of China, signed on December 2, 1954, in Article VI treats Formosa as a territory of the Republic of China: "For the purposes of Article II and V, the terms 'territorial' and 'territories' shall mean in respect of the Republic of China, Taiwan (Formosa) and the Pescadores; * * *". 31 Dept. State Bull. 899 (1954). This recognized *de facto* control over the island of Formosa by the government of the Republic of China is sufficient to make that island "its territory" within the meaning of Section 243(a). Recognition of this is implicit in the decided cases holding that Formosa is a "country". See *Rogers* v. *Cheng Fu Sheng*, *supra*; *United States*

(Formosa) (R. 5, 12). Although there is no such corresponding record reference as to petitioner Lum Wong, his situation is presumably the same as that of the other two petitioners since in the complaint it is alleged that the Attorney General notified each of the petitioners that he intended to deport them to Formosa (R. 2).

ex rel. Leong Choy Moon v. *Shaughnessy*, 218 F. 2d 316 (C.A. 2); *Chao-Ling Wang* v. *Pilliod*, 285 F. 2d 517 (C.A. 7); *Liang* v. *U.S. Department of Justice*, 290 F. 2d 614 (C.A. 9); *Wong Lum* v. *Esperdy*, 187 F. Supp. 95 (S.D.N.Y.). After the Germans had overrun Greece during World War II, leaving it without any territory, it was held that an alien could be deported to the Greek government in exile in England by returning him to a vessel flying the Greek flag (*Delany* v. *Moraitis*, 136 F. 2d 129 (C.A. 4)). The instant case is even stronger since the Republic of China does actually have territory in Formosa upon which it is prepared to receive the returning aliens.

No embarrassment in the conduct of our foreign affairs would result from regarding Formosa as territory of the Republic of China for the purposes of deportation under Section 243(a). This reading does not affect the determination of the status of Formosa and the question as to its sovereignty in other fields. It would be anomalous for the United States to recognize the Republic of China as a lawful government, and at the same time deny it the right to receive its deported citizens into the territory in which that government functions.

Petitioners do not claim any right to remain in this country. They are not being deported to a country with which they have no natural ties. Their deportation has been fairly decreed and is proper under the second alternative for deportation provided in Section 243(a).

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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